

F I L E D
DEC 13 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON
afp

COA# 36130-2
NO. 78829-4

SUPREME COURT
OF THE STATE OF WASHINGTON

EUGENE "CHIP" MUDARRI, an individual; LAKESIDE CASINO, LLC
AND C.F.S. LLC d/b/a FREDDIE'S CLUB OF FIFE,
Petitioners,

v.

THE STATE OF WASHINGTON, which is comprised of various State
entities including, but not limited to, CHRISTINE GREGOIRE, Governor
of the State of Washington; GARY LOCKE, former Governor of the State
of Washington, and as an individual; RICK DAY, Director of the
WASHINGTON STATE GAMBLING COMMISSION: Commissioners
JANICE NIEMI, ALAN PARKER, CURTIS LUDWIG, and GEORGE
ORR; and the WASHINGTON STATE LOTTERY COMMISSION:
Commissioners RACHEL GARSON, CAROL KELJO, ROBERT
SCARBROUGH, LARRY TAYLOR, and MELINDA TRAVIS,

Respondents.

OPENING BRIEF

RECEIVED
CLERK OF SUPREME COURT
STATE OF WASHINGTON
DEC 14 2006
BY S. J. ENRIGHT

JOAN K. MELL, WSBA #21319
Attorneys for Appellants
Miller Quinlan & Auter P.S., Inc.
1019 Regents Blvd., Suite 204
Fircrest, Washington 98466
Telephone: (253) 565-5019
Facsimile: (253) 564-5007

TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	1
(1) Assignments of Error	1
(2) Issues Pertaining to Assignments of Error	2
C. STATEMENT OF THE CASE.....	3
(1) Procedural History	7
D. ARGUMENT	8
(1) Standard of Review.....	8
(2) The Trial Court Should Have Issued a Declaratory Order in Favor of Mudarri Because the Trial Court Agreed the State Lottery Has Discretion to Offer Electronic Scratch Ticket Gaming.....	8
a. The State Lottery Can Offer Electronic Scratch Ticket Gaming.....	8
b. The Governor Had No Authority to Grant Exclusive Gaming Rights to The Puyallup Tribe Affecting Mudarri's Business	25
(i) Wash Const. Art. II § 24	25
(ii) Separation of Powers and Delegation Doctrine	26
c. The Third Amendment is Void	30
(i) The Governor Has No Authority to Negotiate and Contract Away State Jurisdiction to the Detriment of Mudarri's Business	30

(ii) Illegal Monopoly.....	35
(iii) Improper Gift of State Resources	36
(iv) Favorable Tax Rates.....	36
(5) The State Has Breached Its Duty To Mudarri and Has Violated His Rights.....	36
a. Washington State Has Failed to Compete for Lottery Revenue in Breach of Its Duty to Washington Citizens to Provide Services From Legal Gambling.....	36
b. Privileges and Immunities.....	38
c. Due Process.....	40
d. Equal Protection.....	42
e. Equitable Estoppel	43
(6) This Action is Not Moot.....	44
a. The Internet Gambling Bill	44
(7) Attorney’s Fees	45
E. CONCLUSION.....	45

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	29
<i>American Export Door Corp. v. John A. Gauger Co.</i> , 154 Wash. 514, 283 P. 462, 463	35
<i>American Greyhound Racing, Inc. v. Hull</i> , 146 F. Supp. 2d 1012 (D. Ariz. 2001)	15, 27
<i>Anderson v. King County</i> , 158 Wn. 2d 1, 138 P3d 963 (2006).....	39
<i>Bank of Columbia v. Okely</i> , 17 U.S. 235, 4 L. Ed. 559 (1819).....	42
<i>Chemical Bank v. Washington Public Power Supply System</i> , 99 Wn.2d 772, 666 P.2d 329 (1983).....	30
<i>Cheyenne River Sioux Tribe v. State of S.D.</i> , 3 F.3d 273 (8 th Cir. 1993)	14
<i>Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green</i> , 995 F.2d 179 (10 th Cir. 1993)	14
<i>City of Sherrill v. Oneida Indian Nation of New York</i> , 544 US 197, 125 S. Ct 1478 (2005).....	32
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833,118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).....	42
<i>Dairyland Greyhound Park, Inc. v. Doyle</i> , 719 NW 2d 408 (2006)	21
<i>Dairyland Greyhound Park, Inc. v. McCallum</i> , 258 Wis.2d 210, 655 N.W.2d 474 (Wis. App. 2002)	13, 21, 23, 29

<i>Dalton v. Pataki</i> , 5 N.Y. 3d 243, 802 N.Y.S. 2d 72 (NY 2005)	13, 28
<i>Daniels v. Williams</i> , 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).....	41
<i>Dent v. West Virginia</i> , 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889).....	40
<i>Diversified Inv. P'ship v. Dep't of Soc. and Health Servs.</i> , 113 Wn.2d 19, 775 P.2d 947 (1989).....	29
<i>Doe v. City of Lafayette, Ind.</i> , 377 F.3d 757 (7th Cir. 2004)	42
<i>Grant County Fire Protection Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	39
<i>Group Health Co-op. of Puget Sound v. King County Medical Soc.</i> , 39 Wn.2d 586, 237 P.2d 737 (1952).....	36
<i>Hurtado v. California</i> , 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884).....	42
<i>Jacobson v. State</i> , 89 Wn.2d 104, 569 P.2d 1152 (1977).....	18
<i>Kansas ex rel. Stephan v. Finney</i> , 251 Kan. 559, 836 P.2d 1169 (1992).....	26
<i>Makah Indian Tribe v. Verity</i> , 910 F.2d 555(9 th Cir. 1990)	24
<i>Mashuntucket Pequot Tribe v. State of Connecticut</i> , 913 F.2d 1024 (2 nd . Cir. 1990).....	15
<i>McGowan v. Maryland</i> , 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).....	43
<i>McLaughlin v. International Ass'n of Machinists</i> , 847 F.2d 620 (9th Cir.1988)	24

<i>Miller v. City of Bainbridge Island</i> , 111 Wn. App. 152, 43 P.3d 1250 (2002)	30
<i>Narragansett Indian Tribe of Rhode Island v. Rhode Island</i> , 667 A.2d 280 (R.I. 1995)	27
<i>Northern Alaska</i> , 803 F.2d at 468	24
<i>Panzer v. Doyle</i> , 271 Wis.2d 295, 680 N.W.2d 666, 683 (2004).....	13, 21, 23, 29
<i>Quill Corp. v. North Dakota By and Through Heitkamp</i> , 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).....	41
<i>Rumsey Indian Rancheria of Wintun Indians v. Wilson</i> , 64 F.3d 1250 (9 th Cir. 1994)	12
<i>Sackett v. Santilli</i> , 146 Wn.2d 498, 47 P.3d 948 (2002).....	29
<i>Santee Sioux Nation v. Norton</i> , 2006 WL 2792734 (2006).....	12
<i>Saratoga County Chamber of Commerce, Inc. v. Pataki</i> , 1712 N.Y.S.2d 687 (N.Y. App. Div. 2000)	21, 27
<i>Smith v. Safeco Ins. Co.</i> 150 Wn.2d 478, 78 P.3d 1274 (2003).....	8
<i>Standlee v. Smith</i> , 83 Wn.2d 405, 518 P.2d 721 (1974).....	41
<i>State ex rel. Clark v. Johnson</i> , 120 N.M. 562, 904 P.2d 11 (1995)	21, 23, 27
<i>State v. Gedarro</i> , 19 Wn.App. 826, 579 P.2d 949 (1978).....	43

<i>State v. Harner</i> , 153 Wn.2d 228, 103 P.3d 738 (2004).....	43
<i>State v. Johnson</i> , 9 Wn. App. 766, 514 P.2d 1073 (1973).....	41
<i>State v. Smith</i> , 117 Wn.2d 263, 814 P.2d 652 (1991).....	39
<i>State v. Vance</i> , 29 Wash. 435, 70 P. 34 (1902).....	40
<i>Sycuan Band of Mission Indians v. Wilson</i> , 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997).....	12
<i>United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, California</i> , 33 F. Supp. 2d 862 (C.D. Cal. 1998)	15
<i>Washington State Labor Council v. Reed</i> , 149 Wn.2d 48, 65 P.3d 1203 (2003).....	30
<i>Washington v. Confederated Bands and Tribes of Yakima Indian Nation</i> , 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).....	31
<i>Westerman v. Cary</i> , 125 Wn.2d 277, 892 P.2d 1067 (1994).....	43
<i>Wisconsin Senate</i> , 144 Wis.2d at 436, 424 N.W.2d 385.....	22
<i>Wood v. Seattle</i> , 57 Wn.2d 469, 358 P.2d 140 (1960).....	8

Statutes

25 U.S.C. § 2510.....	26
25 U.S.C. § 2701[5].....	11
25 U.S.C. § 2710(d)(1)(B).....	12
25 U.S.C. § 2710[b][1][A]; [d][1][B].	11

25 U.S.C. § 465.....	35
25 U.S.C. § 2710.....	34
RCW 67.70.042	10
RCW 35.79.035	37
RCW 37.12.010	31, 33
RCW 4.84.350	3, 45
RCW 43.06	33
RCW 64.20.010	31
RCW 67.70	6, 10, 11, 37
RCW 67.70.040	37
RCW 67.70.040(1)(a)	6, 11
RCW 67.70.070	6, 10
RCW 67.70.210	10
RCW 9.46.010	9
RCW 9.46.360	10, 26

Other Authorities

S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S.Code Cong & Admin News, at 3076.....	13
Tacoma Municipal Code 9.22.070.....	37
Wash. Const. Art. II § 24	9

Treatises

38 AM. JUR. 2d <i>Governor</i> § 4	27
CHAMBLISS, WILLIAM J. ON THE TAKE, FROM PETTY CROOKS TO PRESIDENTS 60 (2 nd ed. 1978). 9 Horwitz, 14 CARDOZO ARTS & ENT. L.J., at 159	13

Regulations

25 U.S.C. § 2710(d)(6)(A).....	15
25 U.S.C. § 2710[d][3][C].....	28
WAC 315	10
WAC 315.06	10
Indian Gaming Regulatory Act (IGRA).....	11

Constitutional Provisions

Wash. Const. Art. II, § 1 29
Wash. Const. Art. I, § 12 39
Wash. Const. Art. I, § 3 41
Wash. Const. Art. I, § 12 38
Wash. Const. Art. XII, § 22 35
U.S. Const. Amend. XIV, § 1.....41

A. INTRODUCTION

Petitioners (“Mudarri”) seek reversal of summary judgment for the State of Washington. Mudarri wants electronic scratch ticket terminals at his facility in Fife. He wants to operate the terminals under a lottery retailer agreement with the State lottery. If he cannot operate the technology, he wants damages for the State’s misconduct in allowing such terminals to operation on fee land in Fife.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

a. The trial court erred in concluding the State was entitled to summary judgment as reflected in the trial court’s memorandum opinion dated May 18, 2006, and subsequently granting summary judgment to Respondent State of Washington and denying summary judgment to Mr. Mudarri and his companies on July 21, 2006.

b. The trial court erred in entering an Order dated December 22, 2005 Denying in Part Defendant State of Washington’s Motion to Dismiss for Failure to Join An Indispensable Party Under Civil Rule 19 and RCW 7.24.110 of the Uniform Declaratory Judgments Act and Granting It In Part.

(2) Issues Pertaining to Assignments of Error

a. Did the trial court err as a matter of law when it concluded the State Lottery did not have the legal authority to offer electronic scratch ticket gaming at Freddies of Fife? (Assignment of Error Number 1).

b. Did the trial court err by concluding, in contravention to the rules of summary judgment, that Mr. Mudarri intended to operate a “private self-banked lottery” when Mr. Mudarri intended to sell state lottery tickets from a electronic scratch ticket terminal similar to state lottery retailers? (Assignment of Error Number 1).

c. Did the trial court err as a matter of law in ruling the Puyallup Tribe is an indispensable party to Mr. Mudarri’s case against the State that the Puyallup compact and its amendments are void?

(Assignment of Error Number 2).

d. Did the trial court err as a matter of law when it denied Mr. Mudarri’s claim that the Puyallup Compact and the third amendment are unconstitutional? (Assignment of Error Number 1)

e. Did the trial court err in concluding that Mr. Mudarri has no right to relief from the State when the executive branch of government interferes with his constitutional rights when contracting with a tribe? (Assignment of Error Number 1)

f. Do statutory changes in 2006 in an internet gambling bill moot the issues in this case?

(3) Petitioner requests attorney's fees on appeal pursuant to RCW 4.84.350, and remand for a determination of damages.

C. STATEMENT OF THE CASE

Mudarri operates a casino in Fife. CP 444. On November 16, 2004, Respondent Governor negotiated an amendment to the Puyallup Tribe gambling compact that authorized electronic scratch ticket gaming in Fife near Mudarri's casino. CP 451, 773-867. When Mudarri asked the State's permission to operate the same equipment, the State refused and told him his request could not be legally granted. CP 454, 1843-1846. Mudarri sought a declaratory order from the court that the technology did not require further legislative approval or if it did, the compact was void. CP 287-301, 331-351, 377-378; 384- 441, 1860-2428, 2429-2554, 2558-2599, 2698-2719. The trial court denied him any relief, granting summary judgment in favor of the State. CP 2733-2747, 2750-2759. Mudarri appeals the trial court's ruling. Mr. Mudarri seeks either approval of the technology in his facility or a determination that the Governor's grant of exclusive gaming rights to the tribe is improper and his rights have been violated, entitling him to a remand to present his damages case.

“Electronic scratch ticket gaming” (ELS) is a phrase used to describe a popular method of selling lottery tickets. CP 449. The technology substitutes electronic tickets or draws for paper scratch tickets. CP 771, 1856, 1858-1859. Rather than purchasing an individual paper ticket from a preprinted game set, ELS has a predetermined set of wins programmed into a computer. CP 449. A series of terminals display the preprogrammed wins in an electronic format that simulate a slot machine when activated by the player. CP 710-711. The terminal is not the lottery game. The terminal is merely the entertainment component to the predetermined game set programmed into a computer. CP 712-713, 727. The computer can offer multiple game sets from a remote location. CP 2633-2634. The game set determines whether the draw or ticket is a winner. The player at the terminal has no control over whether the terminal displays a win or a loss. CP 731.

The State has authorized eighteen thousand (18,000) terminals to operate in this state. CP 449. The terminals were traditionally located exclusively on trust land situated within a tribal reservation boundary. CP 451-452, 774, 1500. The third amendment to the Puyallup compact shifted the terminals from trust land to fee land. CP 451-452, 773-777.

The fee land at issue in this case is located on a parcel of land subject to a multi-million dollar land settlement agreement between local

and federal governments and the Puyallup tribe. CP 447, 871-1014, 1022-1185. The land settlement agreement included a commitment that Puyallup tribal jurisdiction was limited to trust land. CP 875, 892-893, 895.

When Mudarri developed his casino, the Puyallup tribe was not competing with him because its casino was in a remote location. CP 336. However, the State contracted with the Puyallup tribe to facilitate its relocation along Interstate 5 and extended exclusive gaming rights to it at the location situated in direct competition to Mudarri. CP 451. The Puyallup tribe did not pay anything to the State for its efforts. CP 451.

The Puyallup tribe does not pay any tax on its gaming revenues from electronic scratch ticket gaming. CP 449. Mudarri pays a significant portion of his gambling revenue in gambling taxes. CP 337, 1314, 2393.

The Legislature never approved the third amendment. CP 452. The Legislature has never affirmatively authorized electronic scratch ticket gaming to anyone. CP 449. Electronic scratch ticket gaming came into existence following the “Friendly Lawsuit.” CP 448-449.

The “Friendly Lawsuit” was a federal case between the State and various tribes to determine whether slot machines were permitted in this state. VRP 21-22. The judge determined that stand alone devices that play against the device were not permitted, but that technology that relied upon

a predetermined outcome rather than randomly generated wins was permissible. CP 510.

Permission for EST was inherent in the Legislature's adoption of a state lottery. CP 450, 507, 1399-1400, 1407. The Legislature specifically authorized the State Lottery to sell lottery tickets. CP 446. The only limitation was that the tickets could not be sold from a stand alone device. CP 573; RCW 67.70.040(1)(a).

Following the opinion, the State entered multiple compacts, which set the perimeters of electronic scratch ticket gaming. CP 448. Three thousand terminals operate near Mudarri's business. CP 449. At the same time, the State undertook the sale of scratch tickets through lottery retailers. CP 450, 576-577. Lottery retailers are grocery stores and gas stations on contract with the state to vend the lottery tickets. CP 450, 1554-1589, 2298; RCW 67.70.070. The Lottery Commission contracts with vendors for their specific scratch ticket games and the retailers sell the tickets for a percentage of the revenue. CP 1539-1542. Mr. Mudarri wrote to the Lottery Commission and offered to sell state lottery tickets electronically using electronic scratch ticket technology. CP 454, 1843-1844.

The state lottery was at that time selling electronic tickets via the ZIP game. CP 450, 1549-1550. The ZIP game used technology similar to

a cash card terminal at the grocery store check out stand. CP 385, 450, 1858-1859. The ZIP game was not dispensed from a terminal as entertaining as the terminals used by the tribes. CP 1856, 1858-1859, 2257-2261. Mudarri wants to dispense tickets from terminals like the tribes, but was refused the opportunity. Ex. 454. The Lottery Commission told him that only the tribes had the authority to use those machines under federal law. VRP 16; CP 454, 1845-1846, 2674. However, federal law does not authorize the use of electronic scratch ticket technology for tribes. CP 481-492. Thus, this litigation ensued to resolve the dispute. CP 287-301.

Electronic scratch ticket gaming is a valuable right that generates hundreds of dollars per day per machine in revenue. CP 1318-1323, 1843, 2561-2565. Since its operation, tribal lottery revenues have predominated the legal gambling industry in the State of Washington. CP 1318-1323. State proceeds from lottery revenues continue to spiral downward. The State did not consider Mudarri's proposal as a means to stabilize the state lottery's market share. There was no Commission debate regarding the merits of Mudarri's proposal. VRP 16, December 21, 2005.

1. Procedural History

On March 10, 2006, Mudarri filed a petition for declaratory relief and later amended the petition after filing a claim form to add damages

claims. CP 264. The parties agreed to a stipulated set of facts with multiple exhibits. CP 442-1859. The trial court heard summary judgment on the legal issues. VRP December 9, 2005; VRP December 21, 2005. Damage arguments were segregated for later determination. The trial court granted summary judgment to the State. CP 2725-2731. Mudarri appealed the summary judgment ruling.

D. ARGUMENT

(1) Standard of Review

The standard of review of a trial court's order on summary judgment is de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The appellate court performs the same inquiry as the trial court. *Id.* Summary judgment requires a determination that there are no genuine issues of material fact, considering all material evidence and inferences therefrom most favorably to the non-moving party. *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960).

(2) The Trial Court Should Have Issued a Declaratory Order in Favor of Mudarri Because the Trial Court Agreed the State Lottery Has Discretion to Offer Electronic Scratch Ticket Gaming.

a. The State Lottery Can Offer Electronic Scratch Ticket Gaming.

In 1972, Washington abandoned the long standing constitutional prohibition against gambling by amending Wash. Const. Art. II § 24 to read as follows:

The legislature shall never grant any divorce. Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.

Legalization with regulation was a response to the high level corruption rampant in a “tolerance” system where violations were overlooked.

WILLIAM J. CHAMBLISS, ON THE TAKE, FROM PETTY CROOKS TO PRESIDENTS 60 (2nd ed. 1978). The people recognized gambling was going to go on, even if illegal, due to its popularity. The benefits associated with regulated gambling were determined to be in the state’s best interest. RCW 9.46.010.

The next year after amending the Constitution, the Gambling Act of 1973 was adopted. CP 446. A Gambling Commission was formed to regulate gambling. CP 446.

In 1982, nearly ten years later, a State Lottery was authorized to raise revenue for the state. CP 446. A Lottery Commission was created to offer lottery games, distinct from the Gambling Commission. CP 446. Any state lottery game is not illegal gambling as a matter of law. RCW

67.70.210. Net gambling receipts jumped from \$39.1 million in 1975, to \$230.6 million in 1983. CP 446 Forty-seven percent of the net receipts were attributed to games offered by the State Lottery. CP 446.

The state lottery offers a number of different games and a number of different ways to gamble. RCW 67.70.040; WAC 315, CP 502. One method of gambling is through the purchase of scratch tickets from lottery retailers. RCW 67.70.042; WAC 315.06. Scratch tickets are played in game sets distributed by lottery retailers around the state. CP 1531-1542. Lottery retailers are private business owners licensed by the Lottery Commission to sell tickets for a share of the revenue. RCW 67.70.070. Lottery retailers are authorized to sell scratch ticket games from terminals that look like debit card terminals and candy or pop vending machines. CP 1859.

Scratch tickets are played using electronic technology; however the electronic technology has not included EST terminals in the private sector. CP 454. The State has limited authorization for EST terminals to tribal entities through Executive Branch action. RCW 9.46.360; CP 448. There is no statute or rule on EST. CP 449.

EST terminals are legal because the game is not generated by the terminal, but rather a preprogrammed set of wins are displayed electronically from a mainframe computer. CP 449. This mainframe

computer operates remotely and can store a variety of game sets. CP 711. If the terminals actually generated the opportunity for chance, meaning the device was itself a random number generator, rather than a visual display of a predetermined outcome, then the EST would violate the State Lottery's prohibition on "The use of electronic or mechanical devices or video terminals which allow for individual play against such devices or terminals shall be prohibited." RCW 67.70.040(1)(a). This provision is the only statutory prohibition on the form of lottery games. RCW 67.70.

Congress determined that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701[5]. The only legal means for Defendant State to include electronic scratch ticket gaming in a compact is if the game is in fact legal under Washington law. The key phrase from the Indian Gaming Regulatory Act (IGRA) is that a state "permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710[b][1][A]; [d][1][B].

The Court of Appeals for the Ninth Circuit has determined that the permission required of the State under IGRA is game-specific:

IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity ‘for any purpose by any person, organization, or entity,’ then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir. 1994), *cert. denied by Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997).

The only means for the tribes to operate electronic scratch ticket games is if others can operate the games. Pursuant to binding federal law as stated in *Rumsey*, the tribe may engage in electronic scratch ticket gaming only if such gaming is legal in Washington. The game specific rule of *Rumsey* has recently been affirmed. *Santee Sioux Nation v. Norton*, 2006 WL 2792734 (D. Neb. 2006).

The significance of *Rumsey* to this matter is that Defendant State cannot reintroduce the pre-IGRA regulatory/prohibitory analysis to contend electronic scratch ticket gaming is an illegal state lottery game, but legal for the tribes. Such an exclusive right was never intended under IGRA; in fact, the whole basis for IGRA was to balance the state versus tribal competition over gambling revenues: “The states opposed this assertion of tribal independence. Not only did it defy laws that the states felt were applicable, but it presented competition for the same gambling

dollars that the states were trying to attract for their own state lotteries.”
Horwitz, 14 CARDOZO ARTS & ENT. L.J., at 159.

“The tribal-state compact was designed as a way to reconcile tribal and state interests concerning class III gaming (see S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S. Code Cong & Admin News, at 3076).” *Dalton v. Pataki*, 5 NY 3d 243, 802 NYS 2d 72 (2005).

The State must first legalize a game, *even if only for tribes*, before it can become a compact term.” *Id.* (emphasis added). Other courts have come to similar conclusions. [Citations to six cases omitted.]

...
Neither the “ceiling” view nor the “floor” view of IGRA authorizes *any* state actor to create a monopoly for Indian tribes by superseding, disregarding, or violating fundamental state law.

Panzer v. Doyle, 271 Wis.2d 295, 680 N.W.2d 666, 694-95 (2004), abrogated in part by *Dairyland Greyhound Park, Inc. v. Doyle*, 719 NW 2d 408 (2006)

The Gambling Commission understood this game specific authority when considering Appendix X. CP 1450.

Thus, the fact the tribes are legally operating electronic scratch ticket gaming necessitates the conclusion that the exact same game is legal for others in Washington to operate. Electronic scratch ticket gaming is legal lottery available to the tribes and the State. Mr. Mudarri should be authorized to operate the terminals in his facility via a license through the State Lottery.

Every court to interpret this language from IGRA has held that

Indians may not engage in gambling unless a state permits it:

IGRA provides that “Class III gaming activities shall be lawful on Indian lands *only if* such activities are . . . located in a State that *permits such gaming* for any purpose by any person, organization, or entity. . . .” 25 U.S.C. § 2710(d)(1)(B) (emphasis added). Consequently, where a state does not “permit” gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them. . . .

The “such gaming” language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1256, 1258 (9th Cir. 1994). *See also United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir. 1998) (“[U]nder the IGRA, the State is not required to negotiate for gambling that is illegal under Nebraska law.”); *Cheyenne River Sioux Tribe v. State of S.D.*, 3 F.3d 273, 279 (8th Cir. 1993) (“The ‘such gaming’ language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.”); *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green*, 995 F.2d 179, 181 (10th Cir. 1993) (“Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require both that

gambling devices be legal, 25 U.S.C. § 2710(d)(6)(A), and that the compact be ‘in effect,’ *id.* § 2710(d)(6)(B).’); *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002) (“According to the structure of § 2710(d)(1) and its plain terms, a compact cannot make legal class III gaming not otherwise permitted by state law.”); *United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, California*, 33 F. Supp. 2d 862, 863 (C.D. Cal. 1998) (“Based on the holdings in the Ninth Circuit’s *Rumsey* opinion and *Rumsey II*, the uncompactable Class III gaming currently being conducted by defendants is illegal in California and, therefore, is uncompactable. . . . The State of California is under no obligation to negotiate with the defendant Tribes regarding illegal slot machines and other forms of uncompactable Class III gaming and, therefore, the State is not acting in bad faith.”).

Thus, unanimous federal cases say if the “others” of Washington, like Mr. Mudarri and the State Lottery, cannot have TLS devices, then the Indians cannot have them, either.

Defendant State relies upon the *Mashuntucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2nd Cir. 1990) opinion. This is an opinion decided prior to the 9th Circuit *Rumsey* opinion. The analysis is closer to the *Rumsey* dissent, rather than the majority decision. The

opinion fails to provide any authority regarding special dispensation to the tribes to have gaming not otherwise permitted in the State. In Connecticut, the State had an affirmative statutory provision that allowed Las Vegas type gaming by charitable organizations. The case did not address slot machine or electronic scratch ticket gaming, so its relevance to this case is questionable. However, the Court advised the State to negotiate with the tribe regulatory controls over casino type games approved in statute via the Compact, rather than relying upon regulatory limitations on the approved games in statute. Basically, the Court affirmed the basic premise that some underlying statutory authority for the gaming must exist in order for the tribes to force the State to negotiate regulatory controls via compact. CP 2591.

In this case, the trial court in its Memorandum Opinion at 2, Footnote 3, erroneously claims Judge Van Sickle's order in the "Friendly Lawsuit" declared *Mashuntucket Pequot* to be the law of this state. CP 2726. Yet, Van Sickle said *Rumsey* is the law: "permitted use" within the meaning of IGRA is device specific. CP 502-503.

Given the state's negotiations following the Friendly Lawsuit, EST is clearly legal. The Friendly Lawsuit resulted in an order upon which the State relied to develop Appendix X to the Puyallup gaming compact.

There is no other settlement agreement as it pertains to the Friendly Lawsuit litigation.

The gambling devices the court defined are legal under Washington law or the court would not have held they are proper subjects for compact negotiations: “Pursuant to IGRA, if a state permits certain forms of Class III gambling, it must negotiate with an Indian tribe in an effort to arrive at a compact establishing the conditions under which the same forms of gambling may be engaged in on Indian land.” Order at 4, citing *Rumsey*, 64 F.3d at 1257-58. Thus, what the court held were the proper subject of compact negotiations were by definition legal gambling equipment under Washington law.

b. Trial Court Recognized Court’s Discretion

The trial court struggled to avoid affirming Mudarri’s request that the State Lottery could offer EST gaming without further legislative approval. At page six of the Court’s opinion, the Court explains that the Lottery Commission could have meant in its correspondence rejecting Mudarri’s proposal to negotiate use of EST that EST gaming was illegal or it could have meant that the Lottery Commission elected to exercise its discretion to deny the technology without Legislative approval: “The Director’s statement can be read several ways; the inference that the Commission has decided to decline exercise of its discretion without

specific legislative authority is just as reasonable as the inference petitioner invites.” CP 2730. Whether the Lottery Commission has discretion to offer the games is precisely the legal determination Mudarri sought from the trial court, and the trial court appears to have come to the conclusion argued by Mudarri that the Lottery Commission does have the ability to offer the games. Despite the Court reaching the requested conclusion, the Court denied the requested relief.

The legal conclusion is an important determination. If the Lottery Commission has the discretion to offer the technology then the Lottery Commission’s exercise of discretion is restrained by its duty to raise revenue and recognize the rights of citizens such as Mudarri. The trial court should have granted the declaratory relief requested. EST does not require legislative approval.

(3) The Trial Court Equated an Electronic Scratch Ticket Terminal with an Electronic Scratch Ticket Game Leading to The Erroneous Determination that Mudarri Would Offer Private, Rather than State Lottery Games.

A “private lottery” is a fictional concept introduced into this case by the non-appearing Puyallup Tribe. CP 2624. The Puyallup Tribe introduced this novel concept in its supplemental briefing, which the trial court considered and erroneously adopted. CP 2755.

When ruling on summary judgment, the trial court must consider all facts and inferences therefrom in favor of the non-moving party. *Jacobson v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The trial court did not recognize Mudarri's proposition to the Lottery Commission as an offer to negotiate use of EST in his private casino in the same manner as every other lottery retailer selling scratch tickets in gas stations and grocery stores sell them via a lottery retailer agreement. CP 2729. Instead the trial court speculated that Mudarri would finance the lottery activity and generate his own opportunity for chance. CP 2728 and 2729. Such a conclusion is factually erroneous. Mudarri would have no reason to share a twenty percent revenue with the State if he were operating a "private lottery", and he would not have required permission from the State Lottery. The Gambling Act regulates private activity and the Lottery Act regulates state sponsored activity. The mere fact that he attempted to negotiate with the State Lottery indicates he was interested in a State run lottery. Mudarri was not amending his request at trial from something other than was intended when he wrote to the Lottery Commission.

When selling scratch tickets, the packaging and delivery of the product is what generates the revenue. Since the tribes started selling scratch tickets from electronic terminals, the State Lottery revenues have plummeted. CP 1318-1323. The game set itself has less value than the

packaging. With ELS the State Lottery can control the games set in Olympia while the player is at a terminal in Fife. Mudarri wants the terminals and is willing to invest in the acquisition of the terminals, while the Lottery controls the game sets. He would be partnering with the Lottery Commission in the same manner as every other lottery retailer, except he would utilize the more profitable terminals to sell the tickets. Nothing in the law prohibits the Lottery Commission from utilizing electronic tickets, such as used with the ZIP games.

The Lottery Commission made no effort to contact Mudarri to negotiate his offer. In fact, the Director of the Lottery Commission appears to have summarily disposed of Mudarri's request as "illegal" without exercising any discretion. If the Lottery Commission had communicated with Mudarri, his request would have been clear. It would have been futile for him to submit a lottery retailer application when he was denied use of the technology as illegal. The trial court should have granted declaratory relief that legislative action was not legally required for the State to operate EST terminals at Mudarri's business.

- (4) The Puyallup Tribe Should Not Dictate State Gambling Law**
- a. Any Challenge to Executive Action Is Eliminated if the Tribe's Sovereign Status Controls Whether a Case Can Proceed on the Merits, Eliminating Fundamental Checks and Balances.**

Mudarri should have the opportunity to challenge the validity of the State's actions, which have directly impacted his business. The trial court's conclusion that the Puyallup Tribe was an indispensable party results in unlimited executive power free from judicial challenge. State courts confronting this issue have made an exception to the equitable doctrine of indispensable party in circumstances of third party challenges to tribal compacts. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 1712 N.Y.S.2d 687, 691 (N.Y. App. Div. 2000); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 1057 (2003); *Dairyland Greyhound Park, Inc. v. McCallum*, 258 Wis.2d 210, 655 N.W.2d 474, 487 (Wis. App. 2002); *Panzer v. Doyle*, 271 Wis.2d 295, 680 N.W.2d 666, 683 (2004), abrogated in part by *Dairyland Greyhound Park, Inc. v. Doyle*, 719 NW 2d 408 (2006); *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11, 19 (1995). This State should do the same.

The following analysis from the New York case is compelling:

Plaintiffs' arguments are on firmer ground. Not only will these plaintiffs be stripped of a remedy if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.

Id. at 1058 (emphasis added). Again, the same reasoning applies here.

The court further concluded:

The Tribe has chosen to be absent. Nobody has denied it the “opportunity to be heard”; in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe. . . . While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe’s voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court. . . .

We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe’s nonjoinder. We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit. The Tribe’s nonjoinder is therefore excused, and we proceed to discuss the merits.

Id. at 1058-59 (internal citations omitted).

The Wisconsin courts clearly indicated that its power to resolve disputes would not be eviscerated by procedural technicalities:

The Tribe’s decision not to participate as a party cannot deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between coequal branches of state government. . .

The upshot of accepting the Governor’s invitation to dispose of this case on procedural technicalities would be

to insulate this agreement and any future agreement between a governor and a tribe from the powers of state judicial review. For over 200 years, it has been the province of the judiciary to interpret the constitution and say what the law is. *See Wisconsin Senate*, 144 Wis.2d at 436, 424 N.W.2d 385 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60, (1803)). We are responsible for resolving legal disputes among the three branches of our state government and, therefore, we proceed to the merits of the case.

Panzer v. Doyle, 271 Wis.2d 295, 680 N.W.2d 666, 683 (2004), abrogated in part by *Dairyland Greyhound Park, Inc. v. Doyle*, 719 NW 2d 408 (2006).

A New Mexico court identified the distinction between an action based upon breach of contract, versus a challenge to the Governor's authority under state law, in determining the tribe was not indispensable party. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11, 19 (1995).

CR 19(a) supports the conclusion the Puyallup Tribe is not an indispensable party in this case. If the court enters judgment that Mr. Mudarri as a licensed state lottery retailer may operate the same electronic scratch ticket gaming devices the Tribe operates at its casinos, Mr. Mudarri will have obtained the complete relief he seeks. His dispute is with Defendant State, not the Puyallup Tribe. He has no cause of action

against the Tribe; it is the State that is preventing him from exercising his business rights.

Whether or not the Tribe's gaming rights would be affected makes no difference to the question of complete relief for Mr. Mudarri. Clearly, he can get the complete relief he seeks in the absence of the Tribe, so consideration of the first prong of CR 19(a) proves the Tribe is not a necessary party.

Mudarri can recover damages from the State without any impact to the Puyallup Tribe. Mudarri requested the court fashion relief in the form of monetary damages to compensate him for his inability to offer the games for the period such authority was gifted to the tribe while operating on non-trust land. VRP December 21, 2005. A damage case does not concern the Puyallup Tribe.

With regard to the second prong of CR 19(a), a financial interest is not enough to meet the rule requirements. In a case the State cites, the court said: "Next, the court must determine whether the absent party has a *legally protected interest* in the suit. This interest must be more than a financial stake, *Northern Alaska*, 803 F.2d at 468, and more than speculation about a future event. *McLaughlin v. International Ass'n of Machinists*, 847 F.2d 620, 621 (9th Cir.1988)." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (emphasis in original).

Even assuming the Tribe does have a cognizable interest in this case, in order to be a necessary party, the court must also find the Tribe's absence "may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." CR 19(a)(2). The Puyallup Tribe's sovereign status suggests the conclusions of this litigation cannot be imposed upon it. Mudarri is not seeking such a remedy anyway. While he cannot adversely impact the tribe, the tribe should not be allowed to adversely impact him.

b. The Governor Had No Authority to Grant Exclusive Gaming Rights to The Puyallup Tribe Affecting Mudarri's Business.

(i) Wash Const. Art. II § 24

The Washington State Constitution requires legislative approval of gaming by a supermajority of the legislature. Wash. Const. Art. II, § 24. The legislature has never approved by supermajority electronic scratch ticket gaming for the tribes, or for any person, organization, or entity. CP 449.

If EST falls within the authority of the state lottery, then a supermajority vote of the legislature is not necessary because the lottery measure passed by a supermajority. However, if Defendant State contends

as has the Lottery Director, that the game requires legislative approval, then Appendix X, and the Third Amendment, are unconstitutional because they were not approved by a supermajority of the legislature. The contracts introduced a whole new form of gaming into this state, resulting in exponential growth in gambling. CP 1318-1323, 2283, 2429.

IGRA does not preempt this state's constitutional supermajority requirement. The decision regarding what games are authorized in Indian country was left to the states. 25 U.S.C. § 2510.

(ii) Separation of Powers and Delegation Doctrine

Governor Locke signed the Puyallup compact and subsequent amendments to it without legislative involvement or approval. RCW 9.46.360. By so doing, he violated the principle of separation of powers because the compact involves policy questions that are the exclusive purview of the Legislature. The Puyallup compact and its amendments are, therefore, void.

Kansas was the first state to consider the illegality of an Indian gaming compact its Governor signed without approval of the Legislature. In *Kansas ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992), the Kansas Supreme Court held: "The compact [with the Kickapoo tribe] is essentially legislative in nature and the State can only be bound thereby through appropriate legislative authorization. . . . We conclude the

legislature has enacted no legislation authorizing the Governor to negotiate the compact herein and bind the State thereby.” *Id.* at 572-73.

The court went on to hold:

“Since the governor is a mere executive officer, his general authority is narrowly limited by the constitution of the state, and he may not exercise any legislative function except that granted to him expressly by the terms of the constitution. Hence, a contract entered into with a third person by the governor upon his assumption of authority, which contract is within the province of the legislative department only, will not bind the state; the governor's act is purely ultra vires.”

Id. at 578, quoting 38 AM. JUR. 2d *Governor* § 4.

Other states have followed the Kansas model. See *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1072 (D. Ariz. 2001) (vacated and remanded on other grounds by 305 F.3d 1015 (9th Cir. 2002) (reasoning that Governor engages in a “kind of legislative act by establishing state gaming policy”; interpreting Arizona law); *State ex rel. Clark v. Johnson*, 120 N.M. 562, 574 904 P.2d 11(1995) (“We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in [a number of respects].”); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280, 281 (R.I. 1995) (concluding that the legislative branch exercises exclusive authority

over lotteries in the state and the Governor therefore lacked the authority to bind the state to an Indian gaming compact).

The New York Court of Appeals similarly held the Governor violated separation of powers by entering into a tribal gaming compact. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654 (2003). The New York court quoted IGRA, noting the act requires a large number of public policy determinations. 25 U.S.C. § 2710[d][3][C]. “Compacts addressing these issues necessarily make fundamental policy choices that epitomize ‘legislative power.’ Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under our constitutional structure.” *Saratoga County*, 100 N.Y.2d at 822-23.

Later, after the Legislature had passed a bill authorizing the Governor to execute the tribal state compacts with a specification that the agreements would be deemed ratified by the Legislature upon the governor’s certification that the compacts contained certain provisions, the Court held the separation of powers infirmity had been cured: “The legislature has thus made the necessary policy determinations as to what the tribal-state compacts must contain and has authorized the Governor to implement those policy determinations by executing the compacts to their

specifications.” *Dalton v. Pataki*, 5 N.Y. 2d 243, 802 N.Y.S. 2d 72 (NY 2005).

The New York solution does not work in Washington because the Washington constitutional provision on lotteries does not permit delegation of legislative authority.

By this provision, the people of Washington committed control over gambling to the legislative branch. The Legislature may not delegate the control the people conferred upon it: “Under principles of separation of powers, “[t]he Legislature is prohibited from delegating its purely legislative functions.”” *Sackett v. Santilli*, 146 Wn.2d 498, 504-05, 47 P.3d 948 (2002), quoting *Diversified Inv. P'ship v. Dep't of Soc. and Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). “Under art. II, § 1, [t]he legislative authority of the State is vested in the Legislature ... and it is unconstitutional for the Legislature to abdicate or transfer its legislative function to others.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 234, 11 P.3d 762 (2000) (internal citations omitted).

In summary, the Governor violated the fundamental principle of separation of powers by purporting to bind the State to the Puyallup gaming compact and its amendments. “The brilliance of our constitution is in its checks and balances. The cornerstone of constitutional checks and balances is separation of powers.” *Washington State Labor Council v.*

Reed, 149 Wn.2d 48, 61, 65 P.3d 1203 (2003) (Chambers, J., concurring). Nor can any statute or implication from any statute cure the defect under the rubric of delegation of legislative authority because it is unconstitutional for the Legislature to attempt to delegate a purely legislative function to another branch of government. The Governor's acts in signing the compact and its amendments were, therefore, ultra vires acts. "Acts done without legal authorization or in direct violation of existing statutes are *ultra vires*. *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 165, 43 P.3d 1250 (2002). Moreover, "[a]s a general rule, the unauthorized contracts of governmental entities are rendered void and unenforceable under the ultra vires doctrine." *Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 797, 666 P.2d 329 (1983).

c. The Third Amendment is Void

(i) The Governor Has No Authority to Negotiate and Contract Away State Jurisdiction to the Detriment of Mudarri's Business

The Executive of this State, without Legislative approval, negotiated away the State's jurisdiction over the Fife property and granted exclusive gaming rights to the detriment of Mudarri.

When Washington became a state in 1889, the restrictions on alienation of reservation land were eliminated and Indian fee owners were

then able to sell, lease, or otherwise encumber their own fee land in the same manner as any American citizen. RCW 64.20.010 *et seq.* Non-tribal communities then developed within traditional reservation boundaries. The State has civil and criminal jurisdiction over these fee lands, which are not trust lands. RCW 37.12.010. The United State Supreme court determined the State can properly assume civil and criminal jurisdiction over fee land. *See Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

Washington State jurisdiction over the Emerald Queen Casino and Hotel of Fife, the fee land at issue in this matter, was affirmed in the Land Claim Settlement Agreement, executed and approved legislatively at the state and federal levels. CP 1016-1020. The Land Claim Settlement Agreement clearly provided that Puyallup tribal jurisdiction was limited to trust land. CP 875, 892-893, 895. The Land Claim Settlement Agreement extinguished tribal use of the reservation boundaries to assert rights over non-trust land. *Id.*

The consideration in support of the Land Claim Settlement Agreement of \$162 million dollars precludes the negotiation of special jurisdictional privileges to the Puyallup Tribe operating on non-trust land to the detriment of private property owners, which is why the trust land

requirement was a necessary component to the underlying Puyallup gaming compact when originally adopted.

Non-tribal owners of property within the survey boundaries were assured by the Agreement that jurisdictional disputes were resolved: “This Agreement shall be for the benefit of all public and private landowners whose land titles might or would otherwise be affected by the Tribal claims described above.” CP 85, 904, 1348, 1351, 1354.

Even in locations where there is not a Land Claim Settlement Agreement, tribes cannot unilaterally assert sovereign control over lands not held in trust by simple purchase of title to lands. *City of Sherrill v. Oneida Indian Nation of New York*, 544 US 197, 125 S. Ct 1478, 1482-1483 (2005). In *Sherrill*, the Oneida tribe challenged its obligation to pay property taxes on land within the historical boundaries of its reservation that it recently purchased from a non-tribal owner. The land had not been owned by a tribal member or the tribe for years. The United States Supreme Court held as follows:

Given the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneidas’ long delay in seeking judicial relief against parties other than the United States, standards of federal Indian law and federal equity practice preclude the Tribe from unilaterally reviving its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished

governmental reins and cannot regain them through open-market purchases from current titleholders.

City of Sherrill at 12-21.

The doctrines of laches and unjustifiable expectations were the theories relied upon by the Court, which are applicable in this matter. The land at issue here has been a part of the Fife community since Fife was incorporated. The land has not been owned by the Puyallup Tribe since the late 1800s. CP 452, 1022. The land has been subject to ongoing taxation. CP 451-452, 1185.

The community has built a dependence upon the character of this land and its owners being subject to the same duties and obligations as others.

The Governor of the State of Washington does not have authority to compromise that jurisdiction without Legislative approval. RCW 37.12. *See also*, RCW 43.06 *et. seq.* Documents from the Gambling Commission clearly indicate counsel to the Governor and the Commission knew jurisdiction was a problem given the Land Settlement Agreement. CP 1646, 1648, 1656. The Governor received the legal analysis of the *Phillips Law Group*, advising that the amendment would be illegal because of the Land Settlement Agreement. CP 1657-665.

The Puyallup Tribe argued in favor of the Third Amendment contending the Land Claim Settlement Agreement did not affect the scope

of IGRA, which simply requires the land be “within the limits of” a reservation, and its property fell inside the historical boundaries of the reservation. CP 1608-1612. However, IGRA uses the term “within the limits” of a reservation, which signifies something more than simply inside the historical boundary line of a reservation. If Congress had intended the land simply be within the boundaries of a reservation, it would have used the term “boundaries”, rather than “limits.” Use of the term “limits” signifies jurisdictional control, which is a requirement consistent with the other provisions of IGRA that require actual jurisdiction over the land. 25 U.S.C. 2710. Given the Land Claim Settlement Agreement, jurisdiction depends upon a trust status rather than historical reservation boundaries.

The Land Claim Settlement Agreement bound the State, which the Governor cannot do independently. A Governor’s powers are limited. Ch. 43.06.010 RCW. The Legislature approved the Agreement by legislative act. CP 1016. Any amendment to that Agreement requires legislative approval as well. The Legislature has never authorized the Governor to amend the Agreement without legislative approval. Hence, Governor Locke had no authority to enter into the Third Amendment, granting jurisdiction over non-trust land.

As articulated by the court in *City of Sherrill*:

Congress has provided, in 25 U.S.C. § 465, a mechanism for the acquisition of lands for tribal communities that takes account of the interest of others with stakes in the area's governance and well being. § 465 provides the proper avenue for OINNY to reestablish sovereign authority over territory held by the Oneidas 200 years ago.

The administrative process for conversion of fee land was the necessary relief needed by the Tribe prior to amending the compact for gaming in its present location in the City of Fife. If the tribe's purchase of land is sufficient to extinguish state and local jurisdiction over land, then there would be no need for the federal trust process.

Mudarri was adversely affected by the executive's illegal actions.

(ii) Illegal Monopoly

The executive branch of government has granted exclusive gaming rights to a sovereign, creating an illegal monopoly. "Monopolies and trusts shall never be allowed in this state." WASH. CONST. ART. XII, § 22. As stated in *American Export Door Corp. v. John A. Gauger Co.*, 154 Wash. 514, 519, 283 P. 462, 463 (1929):

Three elements must be present in order to constitute a monopoly or trust within the meaning of the anti-monopoly provision of the State Constitution. There must be a contract, combination or other arrangement between two or more corporations, co-partnerships or associations; it must relate to some product or commodity; and its purpose must be to fix

prices, limit production, or regulate the transportation of such product or commodity. *Group Health Co-op. of Puget Sound v. King County Medical Soc.*, 39 Wn.2d 586, 237 P.2d 737 (1952).

The requirements of this constitutional prohibition have been met in this case. The state agreed to support exclusive gaming rights for the tribe on land not held in trust and in a location where significant state resources were appropriated to resolve jurisdictional disputes pursuant to the Land Claim Settlement Agreement. The third amendment to the Puyallup Compact created an illegal monopoly.

(iii) Improper Gift of State Resources

The Governor improperly gifted jurisdiction and exclusive gaming rights to the tribe without consideration in violation of Wash. Const. Art. VIII, § 5. CP 428-430.

(iv) Favorable Tax Rates

The Governor negotiated special tax treatment in favor of the tribe in violation of Wash. Const. Art. VII §1. CP 431-435.

(5) The State Has Breached Its Duty To Mudarri and Has Violated His Rights

a. Washington State Has Failed to Compete for Lottery Revenue in Breach of Its Duty to Washington Citizens to Provide Services From Legal Gambling

The Lottery Commission shall have the power, and it shall be its duty:

(1) To promulgate such rules governing the establishment and operation of a state lottery as it deems necessary and desirable in order that such a lottery be initiated at the earliest feasible and practicable time, and in order that such lottery produce the maximum amount of net revenues for the state consonant with the dignity of the state and the general welfare of the people.

RCW 67.70.040. The state's support for EST gaming in Fife proves EST at Mudarri's would not vitiate the "dignity of the state and the general welfare of the people." CP 453-454.

The Governor's office knew the Third Amendment was not needed. CP 1597. The City could have vacated the limited portion of Alexander Avenue at issue without harming the tribe. RCW 35.79.035 authorizes vacation of streets for port purposes. The Port's petition included the requisite criteria under Tacoma Municipal Code 9.22.070. CP 1688-1823. Yet, the Governor reversed long standing precedent that limited Class III gaming to trust land. CP 1500. His support, when not needed, indicates EST did not present a risk of harm. CP 788-790, 2274.

Such a complete policy shift in support of electronic scratch ticket gaming in the City of Fife on non-trust land validates Mr. Mudarri's position that electronic scratch ticket gaming at his facility is absolutely consistent with the Lottery Commission's statutory duties.

Pie chart graphs prepared by the Gambling Commission illustrate tribal gaming revenues usurping state gaming revenues. CP 1318-1323. Certainly the tribal revenues are derived from the income of non-tribal

members, as the tribe's marketing targets audiences off the reservation. CP 2256-2265. The State breached its duty by not considering Mudarri's offer to improve lottery revenues.

b. Privileges and Immunities

The Gambling Commission and the Lottery Commission, by refusing to allow Mr. Mudarri to operate EST, violated his rights under the Privileges and Immunities Clause of the Declaration of Rights of the Washington Constitution.

Wash. Const. Art. I, § 12, provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." The Privileges and Immunities Clause was "intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups." *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004), quoting *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring). Here, while legitimating EST terminals for the Puyallup Tribe and forbidding Mr.

Mudarri to employ them in his business, the two Commissions are engaging in unconstitutional “favoritism and special treatment.”

As in *Grant County*, all of the *Gunwall* factors support an analysis of Washington’s Privileges and Immunities Clause that is independent from the equal protection clause of the United States constitution. A comprehensive *Gunwall* analysis is set forth in Mudarri’s summary judgment memorandum at CP 410-443.

“For a violation of article I, section 12 to occur, the law, or its application must confer a privilege to a class of citizens.” *Grant County*, 150 Wn.2d at 812. The courts look for instances of “positive favoritism.” *Anderson v. King County*, 158Wn. 2d 1, 138 P3d 963 (2006). Here, the Gambling Commission and the Lottery Commission have conferred a privilege on the tribes by allowing them to operate EST on fee land, yet have denied Mr. Mudarri the same privilege. But this is not enough to establish a violation: the terms privileges and immunities do not apply to everything a person might want to do, but “pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship.” *Id.* at 813, quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

The fundamental right Mr. Mudarri asserts is the right to engage in business: “It is undoubtedly the right of every citizen of the United States

to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition.” *Dent v. West Virginia*, 129 U.S. 114, 121, 9 S. Ct. 231, 32 L. Ed. 623 (1889). He also asserts a fundamental right to fair tax treatment. Electronic scratch ticket gaming must be legal in Washington because the State has compacted with the tribes to allow it. Yet, Mr. Mudarri has been denied his fundamental right to pursue a similar business and to fair tax treatment. Furthermore, he has been denied the right to profit from a business that has been legitimized by the legislature through the State Lottery. Thousands of grocery stores and gas stations are permitted to operate scratch ticket gaming in an electronic format, but Mr. Mudarri is not.

Conveying these special privileges is precisely what our state constitution’s Privileges and Immunities Clause was adopted in the Declaration of Rights to prevent.

c. Due Process

Both the Washington and United States Constitutions provide that no person shall be deprived of “life, liberty, or property without due process of law.” U.S. CONST. AMEND. XIV, § 1; WASH. CONST. ART. I, § 3. “Due process centrally concerns the fundamental fairness of governmental activity.” *Quill Corp. v. North Dakota By and Through*

Heitkamp, 504 U.S. 298, 312, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).
See also Standlee v. Smith, 83 Wn.2d 405, 411, 518 P.2d 721 (1974) (“The court emphasized that fundamental fairness was the touchstone of due process.”); *State v. Johnson*, 9 Wn. App. 766, 771, 514 P.2d 1073 (1973) (“Fundamental fairness [is] the touchstone of due process. ...”). Here, the denial by the two commissions of Mr. Mudarri’s request to operate EST the tribes are lawfully operating is fundamentally unfair. Logically, operating those machines cannot be lawful under Washington law for the tribes and unlawful for Mr. Mudarri.

The government’s treatment of Mr. Mudarri is precisely an example of the arbitrary exercise of power the Magna Carta attempted to extirpate from Anglo-Saxon law. *See Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (“This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government.”) (internal quotation marks and citations omitted). In claims like Mr. Mudarri’s of deprivation of substantive due process,

[T]he inquiry is whether the individual has been subjected to “the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.” *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244, 4 L. Ed. 559 (1819), *quoted in*

County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), and *Hurtado v. California*, 110 U.S. 516, 527, 4 S. Ct. 111, 28 L. Ed. 232 (1884).

Doe v. City of Lafayette, Ind., 377 F.3d 757, 768 (7th Cir. 2004).

Defendant State's actions violate substantive due process because the State has arbitrarily and capriciously administered its regulatory authority: Electronic scratch ticket gaming cannot be legal in Washington for Indian casinos and 3,500 lottery retailers scattered all over the state, but illegal for Freddie's of Fife. In addition, it cannot promote Evergreen in the Port transaction to the detriment of Freddie's.

The Court should honor and uphold Mr. Mudarri's substantive due process rights.

d. Equal Protection

This State's executive branch of Government has granted exclusive gaming rights to a sovereign based upon its sovereign status. Such action violates Mudarri's equal protection rights.

Strict scrutiny is the appropriate standard of review when a classification affects a fundamental right. *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). The fundamental right at issue is freedom from discrimination. "Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary to accomplish a compelling state interest." *Westerman v. Cary*, 125 Wn.2d 277, 294, 892 P.2d 1067 (1994)

(internal quotation omitted). Offering EST in private venues subject to state regulation is consistent with the Gambling Act's purpose, which was to regulate rather than prohibit gambling because regulation rather than prohibition prevents corruption. Thus, there is no compelling state interest in prohibiting machines in one block that are readily available down the street.

Here, equal protection is violated because the Legislature, via initiative or any other Act, has not authorized such discrimination for the benefit of the Tribe. In Washington, proscriptions imposed upon gambling activity are entirely within the legislative domain. *State v. Gedarro*, 19 Wn.App. 826, 829, 579 P.2d 949 (1978). *See also McGowan v. Maryland*, 366 U.S. 420, 427, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The Legislature has never proscribed electronic scratch ticket gaming. The State has violated Mr. Mudarri's right to equal protection of the laws by rejecting his request to become a lottery retailer and by allowing de facto exclusivity to the tribes.

e. Equitable Estoppel

The State cannot promote EST in Fife and deny it to Mudarri without violating principles of equitable estoppel. The five elements of equitable estoppel are set forth and analyzed at CP 418-422. In summary, Mudarri has a valid claim against the State based upon equitable estoppel

because he relied to his detriment on the State fairly and equitably administering gambling laws. The State has not done that and has misrepresented its capacity to consider EST in the private sector. As a result Mudarri has been damaged and seeks either the technology or the value of the technology in operation in Fife, during the period of use while the land was held in fee.

(6) This Action is Not Moot

a. The Internet Gambling Bill

The State submitted an Answer to Mudarri's Statement of Grounds for Direct Review at 2, contending the appeal was moot due to the Legislature's adoption of the Internet Gambling Bill. This appeal is not moot based upon the legislation. Instead, the Legislation supports Mudarri's contention that the State Lottery had the authority authorize the technology to Mudarri.

In 2006, the Legislature stuck in an internet gambling bill a second subject. The second subject requires supermajority approval of interactive electronic scratch tickets. The legislation does not clearly apply to EST because EST is not a game where the player "interacts" with the terminal to create an element of change. EST is not stand-alone technology. Further, a new supermajority requirements affirms the fact that previously there was no such requirement. If there was, the

legislation was not needed. The State's refusal to permit Mudarri's use of technology has damaged him from the date of denial to the date of the legislation. He can be compensated via a limited term using the technology or by damages equivalent to operating the machines from the date of his request to the effective date of the legislation.

In the alternative, the legislation supports Mudarri's claim that EST technology is not authorized and the executive's authority to operate machines in Fife is VOID. The Governor had no legislative authority to approve the technology. Mudarri should be compensated in damages for the unlawful acts of the executive equal to the revenue from illegal machine gaming in the area of his business.

(7) Attorney's Fees

Mudarri requests attorney's fees and costs on appeal, pursuant to RCW 4.84.350. Further, he has reserved arguments on damages at the trial level. The issues of liability and damages were bifurcated and damages have not been argued to date.

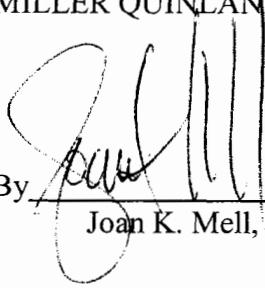
E. CONCLUSION

Summary judgment should be granted to Mr. Mudarri. EST is a legal form of gaming in Washington State. The State's refusal to negotiate use of such technology at Mudarri's facility was negligent and

violated his constitutional rights. He has suffered damages which should
be determined at the trial court.

DATED this 14th day of December, 2006.

MILLER QUINLAN & AUTER, P.S., INC.

By 

Joan K. Mell, WSBA #21319

CERTIFICATE OF SERVICE

On said day below I had delivered via hand delivery by legal messenger service a true and accurate copy of the following document: **Petitioners' Opening Brief** in Court of Appeals No. 78829-4 to the following:

Jerry A. Ackerman
Office of the Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
Attorney for Respondents

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 14th day of December, 2006, at Fircrest, Washington.


Darla Moran, Paralegal
Miller Quinlan & Auter, P.S. In
CLERK
2006 DEC 14 P 2:39
RECEIVED
SUPREME COURT
STATE OF WASHINGTON